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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SHAWN DAY, individually and as  
successor in interest to the Estate of Steffen  
Matthew Day.

Plaintiff,

VS.

COUNTY OF CONTRA COSTA;  
JOSHUA PATZER; WARREN RUPF, and  
Does 1 through 50, et al..

## Defendants.

Case No. C07-4335 PJH

**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT / SUMMARY  
ADJUDICATION**

Date: September 10, 2008  
Time: 9:00 a.m.  
Judge: Hon. Phyllis J. Hamilton  
Dept: Courtroom 3, 17<sup>th</sup> Floor (SF)

Defendants County of Contra Costa (hereafter “County”), Deputy Joshua Patzer (hereafter “Deputy Patzer”), and Sheriff Warren Rupf (hereafter “Sheriff Rupf”), (collectively “Defendants”), hereby file the following Motion for Summary Judgment, or in the alternative, Motion for Summary Adjudication, in this matter.

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## I. INTRODUCTION

This lawsuit arises out of an unfortunate incident where Decedent Steffen Day (hereafter “Decedent”) fled from officers during a brief detention, then fought violently with Deputy Patzer to the point where Decedent was winning the fight, forcing Deputy Patzer to fire one gunshot at Decedent in self defense, fatally wounding Decedent. As can be seen below, Decedent, who was severely intoxicated on methamphetamines, escalated this situation to the point where Deputy Patzer had to use deadly force to stop Decedent’s aggression and to protect the Deputy’s own life. The only living witness to this shooting incident is Deputy Patzer. All in all, per the undisputed facts as demonstrated below, Deputy Patzer’s actions comported with all constitutional requirements and Plaintiff cannot create any genuine and material factual issues to defeat this motion. Defendants are entitled to summary judgment.

## II. ISSUES TO BE DECIDED

- 1) Whether Defendant Patzer is entitled to qualified immunity?
  - (a) Whether Defendant Patzer's conduct in firing at Decedent violated Decedent's rights under the 4<sup>th</sup> Amendment?<sup>1</sup>
  - (b) If there is found to be any triable issue of a material fact under the 4<sup>th</sup> Amendment claim, whether Defendant Patzer is entitled to qualified immunity as the right was not clearly established or whether a reasonable officer could have believed his conduct was lawful?
- 2) Whether Plaintiff can prove a 14<sup>th</sup> Amendment violation for interference with a parental relationship?
- 3) Whether Plaintiff can provide any evidence to support his Monell claim?
- 4) Whether any of Plaintiff's state law claims can survive and/or are subject to state law immunities?

### III. RELEVANT FACTS

On August 15, 2006, at approximately 1:45 a.m., Deputy Patzer was in a full Contra Costa

<sup>1</sup> Plaintiff is not contesting whether or not Defendants had reasonable suspicion to detain Decedent. Rather, Plaintiff only contends the force used on Decedent's was excessive and unreasonable per the 4<sup>th</sup> Amendment.

1 County Sheriff's Office ("SO") uniform, driving in a marked SO patrol car performing patrol  
 2 work with Deputy Vorhauer ("Deputy Vorhauer"), his partner on that date, also in full uniform, in  
 3 the Bay Point area of Contra Costa County. (See Exhibit A, Declaration of Patzer ("Patzer  
 4 Decl.") ¶ 3; Exhibit B, Declaration of Vorhauer ("Vorhauer Decl.") ¶ 3).<sup>2</sup> Deputy Patzer had  
 5 been with the SO since 2000 following his graduation from the police academy and had been  
 6 working the streets in the patrol division since approximately 2003. Since 2004, he had been  
 7 involved with the SWAT and sniper teams and has consistently qualified twice a year for firearms  
 8 training via the SO. (Patzer Decl. ¶¶ 1-2). Deputy Vorhauer had been with the SO since August  
 9 of 2000, since he graduated from the police academy. Deputy Vorhauer had been a patrol officer  
 10 with the SO for two plus years and since December of 2007, is a detective. (Vorhauer Decl. ¶¶ 1-  
 11 2). Since the police academy, both deputies have attended annual advanced officers' training  
 12 with the SO. (Patzer Decl. ¶ 2; Vorhauer Decl. ¶ 2).

13 During their late night patrol, the deputies noticed two vehicles, a pickup truck and a black  
 14 Mustang ("Mustang"), driving erratically and tailgating each other on the roadway. (Patzer Decl.  
 15 ¶ 3; Vorhauer Decl. ¶ 3). The deputies got behind the two vehicles to observe their further  
 16 driving behavior. The vehicles continued to drive erratically. (Patzer Decl. ¶¶ 4, 6; Vorhauer  
 17 Decl. ¶¶ 4,6). Deputy Vorhauer was driving while Deputy Patzer was in the passenger seat,  
 18 attempting to run the license plates of the involved vehicles. (Patzer Decl. ¶ 5; Vorhauer Decl. ¶  
 19 5). The truck started to drive lawfully, though the Mustang continued to drive erratically and  
 20 actually sped up. The deputies followed the Mustang while they attempted to run its license  
 21 plate. (Patzer Decl. ¶¶ 7-9; Vorhauer Decl. ¶¶ 7-9).

22 While following the vehicle, the Mustang stopped briefly and the deputies could see that  
 23 the trunk of the Mustang had an apparent punched lock which was indicative of a stolen vehicle.  
 24 A punched lock is a common criminal technique used for car thefts. (Patzer Decl. ¶¶ 10-11;  
 25 Vorhauer Decl. ¶¶ 10-11). At that point, the deputies believed the vehicle may have been stolen  
 26 so Deputy Patzer continued looking on the computer to see if he could confirm the vehicle's  
 27 status so the two deputies could develop a strategy if they were going to perform a felony traffic

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28 <sup>2</sup> All exhibits referenced herein are attached hereto to the Declaration of James V. Fitzgerald, III, Esq.

1 stop. (Patzer Decl. ¶ 12; Vorhauer Decl. ¶ 12). The Mustang vehicle then continued to flee and  
2 drive on. (Id.).

3 Before being able to confirm via computer whether or not the vehicle was listed as stolen  
4 or other pertinent information, the Mustang pulled left into a driveway. (Patzer Decl. ¶ 13;  
5 Vorhauer Decl. ¶ 13). At that point, the deputies stopped their vehicle and activated both of their  
6 side spotlights to illuminate the Mustang as it was very dark. (Id.). After illuminating the  
7 Mustang, the deputies saw furtive movements inside of the vehicle by the three occupants. More  
8 specifically, the front two passengers appeared to be handing items to the passenger in the back  
9 seat from the floorboard areas. This is common behavior by suspects who are trying to either  
10 hide or obtain weapons or contraband. (Patzer Decl. ¶ 14; Vorhauer Decl. ¶ 14). At that point,  
11 the deputies quickly exited their patrol vehicle to approach the Mustang. Deputy Vorhauer  
12 approached on the driver's side of the vehicle, with his flashlight in hand, while Deputy Patzer  
13 approached on the passenger side, also with his flashlight in hand. (Patzer Decl. ¶ 15; Vorhauer  
14 Decl. ¶ 15). As he approached, Deputy Vorhauer could see broken glass on the floorboard of the  
15 vehicle and a punch tool in the center console which is a tool commonly used by car thieves to  
16 break windows. (Vorhauer Decl. ¶ 16). Deputy Patzer could see that the ignition looked to have  
17 been punched and there was no key in the ignition on the steering column, facts he communicated  
18 to his partner. (Patzer Decl. ¶ 16; Vorhauer Decl. ¶ 17). These were all objective signs that this  
19 vehicle was likely a stolen vehicle.

20 Due to the immediate safety issues for this likely felony encounter involving a stolen  
21 vehicle, Deputy Patzer pulled out his duty weapon and held it in the low ready position behind his  
22 leg. (Patzer Decl. ¶ 17). The front passenger of the Mustang attempted to open the door so  
23 Deputy Patzer was forced to shut the door to keep the occupants inside of the vehicle. (Patzer  
24 Decl. ¶ 18). Deputy Patzer then ordered the front passenger to place his hands on the dashboard  
25 and the back passenger to put his hands on the headrest. (Patzer Decl. ¶ 19). The occupants were  
26 not complying with Deputy Patzer's orders to keep their hands in plain sight. The passenger in  
27 the backseat continued to move. Eventually, the passengers complied with placing their hands at  
28 the appropriate locations where Deputy Patzer could see them. (Patzer Decl. ¶¶ 20-21).

1           During this same time, Deputy Vorhauer was attempting to get the driver (which turned  
 2 out to be Decedent) out of the vehicle so he could put Decedent in a position to search him for  
 3 weapons. Decedent could not turn the Mustang engine off when the deputies ordered him to do  
 4 so and the vehicle remained idling. This was further evidence to the deputies that this vehicle  
 5 may have been stolen and then hot-wired to drive without a key. (Vorhauer Decl. ¶¶ 18-20;  
 6 Patzer Decl. ¶¶ 22-23). As he did not want Decedent to be able to get back into the idling  
 7 vehicle, Deputy Vorhauer asked Decedent to step around the driver's side door and directed him  
 8 towards the front left panel of the vehicle so he could search him for weapons. (Vorhauer Decl.  
 9 ¶¶ 19-20). Decedent then stepped around the driver's side door while Deputy Vorhauer followed  
 10 him towards the front of the car. (Vorhauer Decl. ¶ 21).

11           At the same time period, the rear passenger again dropped his hands from the headrest and  
 12 Deputy Patzer could not see the person's hands which was an obvious officer safety issue.  
 13 (Patzer Decl. ¶ 24). As Deputy Patzer was again ordering the backseat passenger to place his  
 14 hands back on the headrest, Deputy Patzer saw Decedent flee and start running across the front of  
 15 the Mustang, between the front of the Mustang and the garage door of the house, past Patzer's  
 16 direction. (Patzer Decl. ¶ 25; Vorhauer Decl. ¶ 22). Deputy Patzer looked back towards the  
 17 Mustang and saw that the front passenger was again trying to open the car door so Deputy Patzer  
 18 used his foot to kick the door shut to keep the passengers in the vehicle. (Patzer Decl. ¶ 26).  
 19 Deputy Patzer then put his duty weapon back into his holster and chased the Decedent because  
 20 Deputy Patzer was now closer to the fleeing Decedent than Deputy Vorhauer. (Patzer Decl. ¶  
 21 27). Deputy Patzer told Deputy Vorhauer that he was proceeding with a "foot pursuit" of the  
 22 fleeing driver Decedent. (Patzer Decl. ¶ 27; Vorhauer Decl. ¶ 23).

23           Deputy Vorhauer was not able complete any pat search of Decedent so Deputy Patzer did  
 24 not know whether or not Decedent had any weapons on him, like a gun or a knife, when Decedent  
 25 fled. (Patzer Decl. ¶ 28; Vorhauer Decl. ¶ 24). After Decedent ran from the scene, Deputy  
 26 Vorhauer stayed with the other two passengers in the vehicle for officer safety reasons.  
 27 (Vorhauer Decl. ¶ 25).

28           During the foot pursuit, Decedent jumped the wall between that home from where he fled

1 and the home next door and Deputy Patzer could see Decedent fall after jumping over the wall.  
 2 (Patzer Decl. ¶ 29). Deputy Patzer then jumped on top of the wall, watched Decedent run off and  
 3 then jumped down to continue to pursue him. (Patzer Decl. ¶ 30). After Deputy Patzer jumped  
 4 over the wall, he pulled his flashlight out and shined it in the area where he was located which  
 5 was very dark. (Patzer Decl. ¶ 31). Deputy Patzer shined his flashlight towards Decedent who  
 6 was attempting to get into the front door of the nearby residence. (Patzer Decl. ¶ 32). Deputy  
 7 Patzer did not know if Decedent knew the people in that residence or if he was just continuing in  
 8 his attempt to flee. (Patzer Decl. ¶ 33).

9 Deputy Patzer then continued to chase Decedent back out onto the street as Decedent  
 10 moved one more house down the street. (Patzer Decl. ¶ 34). Deputy Patzer loudly yelled to  
 11 Decedent to “stop, Sheriff’s Office, police, stop,” or words to that effect, several times during the  
 12 foot pursuit, but Decedent continued to run and flee, ignoring his orders. (Patzer Decl. ¶ 35).

13 As Deputy Patzer chased Decedent to the house next door, Decedent ran towards the front  
 14 door of that residence. At the last second, Decedent turned towards his right and jumped on the  
 15 nearby fence. As Decedent jumped on the fence, Deputy Patzer caught up to Decedent and  
 16 grabbed Decedent’s shoulders to pull him back down towards him to control and handcuff him.  
 17 (Patzer Decl. ¶ 36). The fence turned out to be a gate and the gate gave way and opened, causing  
 18 Deputy Patzer to fall forward to the ground on his knees and drop his flashlight. At that point,  
 19 there was no ambient light in this side yard area and one could only see by flashlight in this area,  
 20 though Deputy Patzer had dropped his flashlight when he fell. (Patzer Decl. ¶ 37). Decedent and  
 21 Deputy Patzer were in a very narrow side yard area next to a house. There was also significant  
 22 debris and garbage in this narrow area. (Patzer Decl. ¶ 38).

23 As Deputy Patzer was attempting to stand back up and to locate his flashlight, he was hit  
 24 in the face by Decedent, which felt like a fist punch to the left side of his head, which caused him  
 25 to stumble backwards and dazed him. (Patzer Decl. ¶ 39). Deputy Patzer had a hard time seeing  
 26 as the area was very dark and he had dropped his flashlight which now was located under the  
 27 debris in this narrow area. (*Id.*).

28 Deputy Patzer went to grab Decedent to prevent him from continuing to run and instead of

1 grabbing Decedent's back, as Deputy Patzer had anticipated if Decedent was indeed attempting to  
 2 further flee, Deputy Patzer grabbed Decedent's shoulders as Decedent was facing Deputy Patzer.  
 3 Deputy Patzer could now feel Decedent continuing to punch and take swings at him in a  
 4 threatening manner. (Patzer Decl. ¶ 40). Deputy Patzer ducked his head between his arms to  
 5 prevent Decedent from hitting him square in the face or head area at which point Deputy Patzer  
 6 started to be pushed backwards by Decedent. Some of Decedent's blows were making contact  
 7 with Deputy Patzer on the side of his head, the top of his head and in his shoulder areas. (Patzer  
 8 Decl. ¶ 41). Deputy Patzer then pushed Decedent away from him thinking that this would give  
 9 Decedent time to run away and would stop his assault and battery on Deputy Patzer. At this point  
 10 in time, Deputy Patzer was on uneven ground, he was slipping around on the debris on the ground  
 11 and he could not gain any solid leverage or balance. (Patzer Decl. ¶ 42).

12 As Deputy Patzer regained his balance, Decedent was again forcing himself on Deputy  
 13 Patzer, causing the Deputy to fall down in a pile of debris and garbage that was on the ground in  
 14 this narrow side yard of the house where the two were located. (Patzer Decl. ¶ 43). It was so  
 15 dark in that side yard area during the struggle that Deputy Patzer could only really see a silhouette  
 16 of Decedent and could not specifically see Decedent's hands or if Decedent had any weapons in  
 17 his hands or in his waistband. (Patzer Decl. ¶ 44). When Deputy Patzer had fallen back down to  
 18 the ground, his right arm went through the pile of trash and he held his left arm up to try to  
 19 protect himself from Decedent who was now essentially on top of him and aggressively swinging  
 20 at Deputy Patzer. Decedent was once again hovering over Deputy Patzer at this point, Decedent  
 21 was in the position of advantage and his punches were making contact with Deputy Patzer's  
 22 body. (Patzer Decl. ¶ 45).

23 Deputy Patzer used his legs to push off the ground and to get up again. As he was getting  
 24 up, Deputy Patzer expected Decedent to just run away and that was okay with Deputy Patzer as  
 25 Decedent had been on top of him twice, had been overpowering the Deputy and Deputy Patzer  
 26 was still dazed from the initial punch to the face. Deputy Patzer was willing to let Decedent run  
 27 away to get Decedent away from him at that time to stop Decedent's violent assault in this narrow  
 28 and very dark area. (Patzer Decl. ¶ 46). Instead of fleeing, Decedent came at Deputy Patzer

1 again swinging at Deputy Patzer in an aggressive manner. Deputy Patzer put his left arm up to  
 2 protect himself from Decedent's assault and put his other hand on his duty weapon. (Patzer Decl.  
 3 ¶ 47).

4 As Deputy Patzer was being pushed back, something hit Deputy Patzer from behind in the  
 5 middle of his back which he believed could have been an ambush from either the other  
 6 passengers in the Mustang or friends of Decedent that came from a nearby house where they were  
 7 located to join in on the assault and battery on Deputy Patzer. (Patzer Decl. ¶ 48). Decedent  
 8 continued to use aggression towards Deputy Patzer causing him to again lose his footing.  
 9 Decedent was now on top of Deputy Patzer for the third time, was pushing the Deputy backwards  
 10 and continually punching and hitting him. (Patzer Decl. ¶ 49). During that process, Deputy  
 11 Patzer had grabbed his duty weapon, tried to step back and bend down a little bit and fired one  
 12 gunshot at the direction of Decedent with his arm bent backwards, close to his body and away  
 13 from Decedent, in what is known in the law enforcement field as the "retention position." This  
 14 retention position is used by officers in situations when they are being assaulted and/or to prevent  
 15 a suspect from grabbing the officer's gun. (Patzer Decl. ¶ 50). Deputy Patzer did not have a taser  
 16 on him at the time of the incident. Also, he could not use a baton or pepper spray due to the close  
 17 proximity of Decedent to him and the severity and constant rapid barrage of aggression from  
 18 Decedent, forcing Deputy Patzer to defend his life. (Id.).

19 Deputy Patzer saw the muzzle of the gun flash as it was very dark in that area which had  
 20 no ambient lighting. The force of the gunshot made Deputy Patzer's foot slip out on the ground  
 21 so he had to again regain his balance. (Patzer Decl. ¶ 51). Immediately after the gunshot, the  
 22 force on Deputy Patzer by Decedent had stopped, the Deputy's arm then went straight out with  
 23 the gun towards the area of Decedent and it appeared at first that Decedent may had run off as  
 24 Deputy Patzer could not feel him nearby. (Patzer Decl. ¶ 52). Deputy Patzer could see his  
 25 flashlight down and to his left underneath the debris so he kicked the garbage away and picked up  
 26 his flashlight. Deputy Patzer immediately shined the light behind him to see who or what was  
 27 behind him and saw that there was nothing behind him except for an external square air  
 28 conditioner unit in the window of the house. (Patzer Decl. ¶ 53).

1           Deputy Patzer then shined the flashlight in front of him and noticed Decedent on the  
 2 ground attempting to get up. Deputy Patzer again yelled "Sheriff's Office, stay on the ground,  
 3 don't get up" or words to that effect. (Patzer Decl. ¶ 54). At this time, Deputy Patzer had his  
 4 duty weapon and flashlight out and both were pointed at Decedent. Deputy Patzer was physically  
 5 exhausted at this point due to the significant struggle with Decedent. (Patzer Decl. ¶ 55).

6           As Decedent was attempting to get up, Deputy Patzer could see that he was bleeding.  
 7 Deputy Patzer then got onto his radio and immediately asked for a Code 3 cover, meaning asking  
 8 other officers to come to the scene urgently with lights and sirens to assist, and he also asked  
 9 dispatch to send fire and ambulance for Decedent. Deputy Patzer also informed dispatch that  
 10 shots had been fired and the suspect was down. Deputy Patzer informed dispatch of his location  
 11 as he could see the number of the house across the street. (Patzer Decl. ¶ 56). At that point,  
 12 Deputy Patzer was unsure of what Deputy Vorhauer was doing with regard to the other two  
 13 passengers of the Mustang, whether the passengers were armed, fighting with the officer or  
 14 fleeing. (Patzer Decl. ¶ 57). Soon thereafter, other officers arrived on the scene and Deputy  
 15 Patzer was quickly sequestered away from the side yard area and into a SO patrol vehicle while  
 16 the other officers took control of the scene. (Patzer Decl. ¶ 58). Before Deputy Patzer was  
 17 sequestered, he assisted in moving some of the garbage out of the way so the gate could be fully  
 18 opened and there could be a path through the gate for medical staff and other officers. It was  
 19 apparent to Deputy Patzer that the side yard area gate was not meant to be opened as it appeared  
 20 that garbage and debris had accumulated for a long period of time behind that gate. (*Id.*)

21           From Deputy Vorhauer's perspective, approximately 30-40 seconds after Decedent ran  
 22 from the scene, he heard a single gunshot nearby. (Vorhauer Decl. ¶ 26). Deputy Vorhauer then  
 23 pulled out his firearm and pointed it at the two passengers in the Mustang as he did not know the  
 24 circumstances surrounding the single gunshot. (Vorhauer Decl. ¶ 27). Deputy Vorhauer waited  
 25 to hear from Deputy Patzer as to what was going on and shortly thereafter, Deputy Patzer  
 26 broadcasted over the radio that shots had been fired, the suspect was down and Deputy Patzer was  
 27 requesting Code 3 cover and for dispatch to send Code 3 fire and ambulance to the scene.  
 28 (Vorhauer Decl. ¶ 28).

Once the other passengers in the Mustang were safety handcuffed, Deputy Vorhauer located Deputy Patzer and asked him what happened. Deputy Patzer stated to Deputy Vorhauer something to the effect of that the guy (Decedent) was on top of him and had hit him (Deputy Patzer). (Vorhauer Decl. ¶ 29). Deputy Vorhauer could see a large fresh bump/knot injury on the left side of Deputy Patzer's forehead. (Vorhauer Decl. ¶ 30). Soon thereafter, like Deputy Patzer, Deputy Vorhauer was quickly sequestered away from the scene and into a Sheriff's Office patrol vehicle. (Vorhauer Decl. ¶ 31).

During the time when Deputy Patzer was pursuing Decedent, on at least five to seven occasions, Deputy Patzer stated to Decedent that he was "Sheriff's Office, stop running," and Sheriff's Office, stop resisting" or words to that effect. (Patzer Decl. ¶ 59). In retrospect, the item that hit Deputy Patzer in the back when he was in the side yard defending himself from Decedent's assault and battery was apparently the external square air conditioner unit in the window. (Patzer Decl. ¶ 60). After he was sequestered, Deputy Patzer became aware of the injuries he suffered in this altercation, including knots on his forehead and head, scrapes on his hands, arms and knees. Deputy Patzer's uniform was also damaged in the knee area and he had lost buttons off his shirt from the violence by Decedent. (Patzer Decl. ¶ 61).

At the time that Deputy Patzer intentionally fired one gunshot at Decedent, Deputy Patzer firmly believed that Decedent was going to get on top of him again, would perhaps overpower him and obtain his weapon and shoot him. At that moment, Deputy Patzer believed his life was in immediate danger so he defended his life by shooting at Decedent to stop Decedent's violent assault and battery. Decedent was very strong during this struggle and was overpowering Deputy Patzer up until the point when Deputy Patzer fired at Decedent. (Patzer Decl. ¶ 62). Deputy Patzer did not fire his weapon at Decedent accidentally. (Patzer Decl. ¶ 63).

On more than one occasion, Decedent had the opportunity to stop resisting, to retreat and/or to flee out of the side yard area of the house during the struggle, but instead chose to continue threatening Deputy Patzer with assault and battery and endangering Deputy Patzer's life. (Patzer Decl. ¶ 64). At no point did Decedent ever stop resisting. (Patzer Decl. ¶ 65).

From the time when Decedent started struggling with Deputy Patzer in the side yard after

1       they both went over the fence to the time when Deputy Patzer fired his weapon at Decedent was a  
 2       time period of approximately 15-20 seconds. (Patzer Decl. ¶ 66). Deputy Patzer is aware that  
 3       Decedent died as a result of the gunshot wound. (Patzer Decl. ¶ 67). Deputy Patzer is also aware  
 4       that a significant amount of methamphetamine was found in Decedent's system. (Patzer Decl. ¶  
 5       68). A methamphetamine cutting substance was also found in the pants pocket of Decedent.  
 6       (Pazter Decl. ¶ 69). Also, Decedent did not have a California driver's license though he was  
 7       driving the Mustang. (Pazter Decl. ¶ 70). Overall, from the time the deputies stopped their patrol  
 8       car and got out of the car due to the Mustang occupants' dangerous furtive movements to the time  
 9       when Deputy Patzer broadcasted that a gunshot had been fired, was a period of approximately  
 10      two minutes. (Patzer Decl. ¶ 71; Vorhauer Decl. ¶ 32).

11       Decedent was taken to the hospital in an ambulance and died shortly after arriving at the  
 12      hospital. (See **Exhibit C**, Complaint for Damages ¶ 21). Dr. Peterson performed the autopsy on  
 13      Decedent. (See **Exhibit D**, Declaration of Dr. Peterson ("Peterson Decl.") ¶ 1-3). The cause of  
 14      death was internal bleeding due to the gunshot wound. (Peterson Decl. ¶ 6). The bullet came  
 15      through the front of Decedent's body, went through his abdominal wall and severed a key artery,  
 16      then lodged in his pelvis. (Peterson Decl. ¶ 5). At the time of his death, Decedent was  
 17      approximately five foot eleven inches tall and weighed 178.5 pounds. (Peterson Decl. ¶ 4). On  
 18      the date of the incident, Deputy Patzer was five feet eleven inches tall and weighed approximately  
 19      180-190 pounds. (Patzer Decl. ¶ 79). Upon external examination, Dr. Peterson found fresh  
 20      scratches on the back of Decedent's right hand which were consistent with Decedent being in a  
 21      struggle and punching. Dr. Peterson also found a fresh abrasion in the middle of Decedent's  
 22      forehead that was a brush-type abrasion and a fresh abrasion on Decedent's chest that was  
 23      reminiscent and matched a pattern of contact with a fence. (Peterson Decl. ¶ 7).

24       Per Dr. Peterson's request, Decedent's blood was tested for toxicological results. In terms  
 25      of toxicology, a significant amount (0.55 micrograms per ml.) of methamphetamine was detected  
 26      in Decedent's system at the time of his death. (Peterson Decl. ¶ 8; see also **Exhibit E**,  
 27      Toxicology Report). It is generally accepted in the medical community that a methamphetamine  
 28      level higher than 0.50 is deemed a lethal level and Decedent's level was above that lethal level.

1 (Peterson Decl. ¶ 9). It is also very likely that Decedent had a higher level of methamphetamine  
 2 in his system at the time of the shooting incident which was then diluted during the introduction  
 3 of intravenous fluids for Decedent's emergency medical treatment. (Id. at ¶ 10). Also, Decedent  
 4 had an amphetamine level of 0.04 micrograms per ml. which means that only a small amount of  
 5 methamphetamine was metabolized, indicating that Decedent had used methamphetamine  
 6 recently before his death. Succinctly stated, a large, potentially lethal, and recent dose of  
 7 methamphetamine was found in Decedent's system at the time of his death. (Id. at ¶¶ 11-12).

8 Following this incident, photographs were taken of the involved Mustang, the scene of the  
 9 incident and Patzer's injuries. (See **Exhibit F**, Declaration of Alex Taftya with Photographs of  
 10 Mustang and Scene; **Exhibit G**, Photographs of Patzer's Injuries (authenticated per Patzer's Decl.  
 11 ¶¶ 72-73)). In addition, a video was taken of the coned path of travel of Decedent and Patzer  
 12 from the Mustang to the area of the shooting, as well as aerial photographs of the same. (See  
 13 **Exhibit H**, Video of Coned Path of Travel of Decedent and Patzer and Aerial Photographs of  
 14 Coned Path (authenticated per Patzer's Decl. ¶¶ 74-78)). This evidence strongly corroborates  
 15 Defendants arguments in this motion.

16 The facts of the methamphetamine in Decedent's system, the cutting agent in his pants,  
 17 the fact that he had no driver's license, and was driving a potentially stolen vehicle were all  
 18 factors that perhaps explain Decedent's flight and significant struggle to prevent Deputy Patzer  
 19 from arresting him for those crimes. Overall, Decedent had several opportunities to stop resisting  
 20 and/or stop further flight from Deputy Patzer during the struggle, but instead chose to stay and  
 21 violently attack Deputy Patzer. Deputy Patzer was never able to gain the upper hand in the  
 22 struggle and Decedent's drug intoxication caused him to act aggressively, with increased strength,  
 23 and violently towards Deputy Patzer. At the critical moment, Deputy Patzer was in fear of his life  
 24 and used deadly force to stop Decedent's fierce attack and to defend himself. Deadly force was  
 25 justified under the circumstances facing Deputy Patzer and Deputy Patzer's actions were lawful,  
 26 constitutional and entitle him and the other Defendants to summary judgment.

27                            ///

#### **IV. LEGAL ARGUMENTS**

#### **A. Plaintiff's Claims**

On August 22, 2007, Plaintiff Shawn Day, Decedent's father, filed suit for civil rights and wrongful death in this Court. In his Complaint, Plaintiff alleges the following claims for relief (See Exhibit C).

(1) § 1983 claim for excessive force via the 4<sup>th</sup> Amendment versus Defendant Patzer;

(2) § 1983 claim for violation of parental relationship, an interest protected by the 14<sup>th</sup> Amendment versus Defendant Patzer;

(3) Monell claim versus Defendant Sheriff Rupf;

(4) Wrongful death (negligence) versus all Defendants;

(5) Violation of California Civil Code § 52.1, interference with Decedent's rights per the 4<sup>th</sup> Amendment and California Constitution per threats, intimidation and coercion versus Defendants Patzer and the County of Contra Costa.

In discovery, Defendants requested that Plaintiff admit that “ Deputy Patzer’s shooting of Decedent Steffen Day was objectively reasonable within the meaning of Graham v. Connor.” (See Exhibit I, Defendant Patzer’s Request for Admission, Set One, to Plaintiff, along with Plaintiff’s Response to Defendant Patzer’s Request for Admission) If Plaintiff’s response was anything other than an unqualified admission, Plaintiff was charged with responding to special interrogatories stating all facts, witnesses and documents supporting such a position. In response (See Exhibit J, Plaintiff’s Supplemental Response to Deputy Patzer’s Special Interrogatories, Set One, No.’s 1-3), Plaintiff denied the request for admission and stated eight facts that Plaintiff contends supports its denial and consequently his facts in support of his liability claims.

1. Defendant Patzer was a much larger man than (sic) the defendant as evidenced by records produced by defendant.
2. Defendant Patzer did not use or reasonably attempt to use less than lethal force to arrest the decedent.
3. Defendant made conflicting statements as to whether or not the decedent attempted to take control of his weapon.

1           4. Decedent was unarmed.

2           5. No evidence that Patzer knew that decedent was under the influence of a drug.

3           6. No evidence that Patzer believed decedent was a violent person or had committed

4           prior acts of violence.

5           7. The short time between Patzer giving chase to decedent and the time of the

6           shooting indicates no time sufficient for the kind of physical altercation between

7           decedent and Patzer as claimed by Patzer.

8           8. Neighbors did not see or hear any fights between Patzer and the decedent.

9           Plaintiff only identified as witnesses the witnesses in the police report and in the transcript

10          of the Coroner's Inquest and no other documents were identified to support these allegations.

11          Significantly, these responses came after a long meet and confer process by counsel for the

12          parties to identify Plaintiff's evidence that would be offered to try to oppose this motion. None of

13          these allegations are supported by credible evidence and/or are sufficient to defeat Defendants'

14          motion.<sup>3</sup> All of Plaintiff's claims for relief are subject to Defendants motion for summary

15          judgment, or in the alternative, motion for summary adjudication.

16           **B. Summary Judgment Standards**

17          Summary judgment is properly granted when no genuine and disputed issues of material

18          fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant

19          is clearly entitled to prevail as a matter of law. FRCP 56; *Celotex Corp. v. Catrett*, 477 U.S. 317,

20          322-23 (1986); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9<sup>th</sup> Cir.

21          1987). A fact is "material" if it is relevant to an element of a claim or a defense, the existence of

22          which may affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*

23          *Ass'n*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).

24          Where the moving party does not bear the burden of proof on an issue at trial, the moving

25

26          <sup>3</sup> As the Court will recall, at the initial case management conference in this case on November 29, 2007, the court

27          asked Mr. Cook what evidence he had to attempt to establish liability. After Mr. Cook responded, the Court was

28          skeptical of Plaintiff being able to prove these claims and that Plaintiff had an uphill battle as he had no witnesses to

                support his liability allegations. As we agreed with the Court's impressions, we then followed up with specific,

                directed discovery as stated above to flush out any evidence to support Plaintiff's 4<sup>th</sup> Amendment claim. Plaintiff's

                responses are patently inadequate to prove a constitutional violation.

1 party may discharge its burden of showing that no genuine issue of material fact remains by  
 2 demonstrating that “there is an absence of evidence to support the non-moving party’s case.”  
 3 Celotex, 477 U.S. at 325. The moving party is not required to produce evidence showing the  
 4 absence of a material fact on such issues, nor must the moving party support its motion with  
 5 evidence negating the non-moving party’s claim. Id.; see also Lujan v. National Wildlife  
 6 Federation, 497 U.S. 871, 885 (1990); Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1409 (9<sup>th</sup>  
 7 Cir. 1991). If the moving party shows an absence of evidence to support the non-moving party’s  
 8 case, the burden shifts to the opposing party to produce “specific evidence, through affidavits or  
 9 admissible discovery material, to show that the dispute exists.” Bhan, 929 F.2d at 1409. This  
 10 requires more than the “mere existence of a scintilla of evidence in support of the plaintiff’s  
 11 position,” there must be “evidence on which the jury could reasonably find for the plaintiff.”  
 12 United States ex rel. Anderson v. N. Telecom, Inc., 52 F.3d 810, 815 (9th Cir. 1995). “The more  
 13 implausible the claim or defense asserted by the nonmoving party, the more persuasive its  
 14 evidence must be to avoid summary judgment.” Id. A complete failure of proof concerning an  
 15 essential element of the non-moving party’s case necessarily renders all other facts immaterial.  
 16 Celotex, 477 U.S. at 323.

17 **C. Defendant Deputy Patzer is Entitled to Qualified Immunity**

18 Qualified immunity shields an officer from suit when he or she makes a decision that,  
 19 even if constitutionally deficient, reasonably misapprehends the law governing the circumstances  
 20 he or she confronted. Brosseau v. Haugen, 543 U.S. 194, 198 (2004), citing Saucier v. Katz, 533  
 21 U.S. 194, 206 (2001) (**qualified immunity operates “to protect officers from the sometimes**  
 22 **‘hazy border between excessive and acceptable force’”**). (emphasis added). When confronted  
 23 with a claim of qualified immunity, a court must first ask that taken “in the light most favorable to  
 24 the party asserting the injury, do the facts alleged show the officer’s conduct violated a  
 25 constitutional right?” Brosseau v. Haugen, 543 U.S. 194, 197 (2004), citing Saucier, at 201.

26 Even if the above question is answered in the affirmative, meaning the court finds Deputy  
 27 Patzer’s actions objectively unreasonable under the 4<sup>th</sup> Amendment, the next inquiry is whether,  
 28 at the time of the officers’ actions, it was clearly established that the officer’s conduct violated the

1 constitutional rights of the injured person. Brosseau, at 199-200, citing Saucier, at 202. In other  
 2 words, because the focus is on whether the officer had fair notice that his or her conduct was  
 3 unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.  
 4 Brosseau, at 198. If the law at that time did not clearly establish that the officers' conduct would  
 5 violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens  
 6 of litigation. Id. The Plaintiff bears the burden of proving the existence of a clearly established  
 7 right at the time of the alleged impermissible conduct. David v. City of Fremont, 2006 U.S. Dist.  
 8 LEXIS 57211, \*47-49 (N.D. Cal. 2006). If Plaintiff meets their burden of proving the existence  
 9 of a clearly established right at the time of the alleged impermissible conduct, the next inquiry is  
 10 whether a reasonable official could have believed that the conduct was lawful. Id. at 48.

11 Here, Plaintiff cannot prove that Defendant Deputy Patzer violated Decedent's 4<sup>th</sup>  
 12 Amendment rights. Even if Plaintiff can somehow prove a genuine issue of material fact exists,  
 13 Deputy Patzer is still entitled to qualified immunity per the second prong of Saucier.

14       1.       Defendant Patzer Acted in an Objectively Reasonable Manner  
 15                   Under the 4th Amendment in His Use of Deadly Force

16 Plaintiff alleges claims for excessive force arising out of the shooting of Decedent per the  
 17 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> claims for relief in Plaintiffs' Complaint. As is clear, the crux of Plaintiff's case  
 18 here is claimed unreasonable and excessive force under the 4<sup>th</sup> Amendment, though he also  
 19 includes a state law wrongful death claim and a related state law civil rights claim. Claims of  
 20 excessive force are to be judged under the 4<sup>th</sup> Amendment's "objective reasonableness"  
 21 standard. Brosseau v. Haugen, 543 U.S. 194, 197 (2004), citing Graham v. Connor, 490 U.S.  
 22 386, 388 (1989) (emphasis added).<sup>4</sup> Determining whether the force used to effect a particular  
 23 seizure is reasonable under the 4th Amendment requires a "careful balancing of the nature and  
 24 quality of the intrusion on the individual's 4th Amendment interests against the countervailing

25  
 26       4 The "objective reasonableness" standards of Graham and Garner have been extended to state law negligence and  
 27 intent based claims involving police use of force. Martinez v. County of Los Angeles (1996) 47 Cal.App.4<sup>th</sup> 334,  
 28 343-344; Edson v. City of Anaheim (1998) 63 Cal.App.4<sup>th</sup> 1269, 1273-74 [plaintiff must prove unreasonable force to  
 establish liability for both wrongful death and intentional tort claims against a police officer]. As such, if Defendants  
 can prevail under the 4th Amendment or qualified immunity is given, all state law negligence and intent based claims  
 will also be adjudicated in Defendants favor, namely the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> claims for relief.

1 governmental interests at stake.” Graham, 490 U.S. at 396. In Graham, the Supreme Court  
 2 adopted an objective reasonableness test that requires an analysis of “facts and circumstances of  
 3 each particular case, including the (1) severity of the crime at issue, (2) whether the suspect poses  
 4 an immediate threat to the safety of the officer or others, and (3) whether he is actively resisting  
 5 arrest or attempting to evade arrest by flight.” Id. (citing Tennessee v. Garner, 471 U.S. 1, 8–9  
 6 (1985)) (emphasis added). A police officer may reasonably use deadly force where he “has  
 7 probable cause to believe that the suspect poses a threat of serious physical harm, either to the  
 8 officer or to others.” Tennessee v. Garner, 471 U.S. at 11. Garner is simply an application of the  
 9 4<sup>th</sup> Amendment’s reasonableness test articulated in Graham and deadly force cases are to be  
 10 analyzed per reasonableness standards. Scott v. Harris, 127 S.Ct 1769, 1777 (2007).

11 The reasonableness of a particular use of force must be judged from the perspective of a  
 12 reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Graham, 490  
 13 U.S. at 396. It cannot be underscored enough that “[T]he calculus of reasonableness must  
 14 embody allowance for the fact that **police officers are often forced to make split-second**  
 15 **judgments in circumstances that are tense, uncertain, and rapidly evolving about the**  
 16 **amount of force that is necessary in a particular situation.”** Id. at 396–97. (emphasis added).

17 As aptly stated by the Sixth Circuit Court of Appeals in Smith v. Freland, 954 F.2d 343,  
 18 347 (6th Cir. 1992), cert. denied:

19 [W]e must avoid substituting our personal notions of proper police  
 20 procedure for the instantaneous decision of the officer at the scene.  
 21 We must never allow the theoretical, sanitized world of our  
 22 imagination to replace the dangerous and complex world that  
 23 policemen face every day. What constitutes “reasonable” action  
 24 may seem quite different to someone facing a possible assailant  
 25 than to someone analyzing the question at leisure.  
 26 Furthermore, as stated succinctly by the 11<sup>th</sup> Circuit, “from the viewpoint of an officer  
 27 confronting a dangerous suspect, “a potential arrestee who is neither physically subdued nor  
 28 compliantly yielding remains capable of generating surprise, aggression, and death.” Menuel v.  
City of Atlanta, 25 F.3d 990, 995 (11<sup>th</sup> Cir. 1994). (emphasis added). Further, the 4<sup>th</sup>  
 29 Amendment does not require a law enforcement officer to exhaust every alternative before using  
 30 justifiable deadly force. Plakas v. Drinski, 19 F.3d 1143, 1148 (7<sup>th</sup> Cir. 1994).

1           A Ninth Circuit case with similar facts to this case found the officer's use of deadly force  
 2 constitutional. Billington v. Smith, 292 F.3d 1177 (9<sup>th</sup> Cir. 2002). In Billington, an off duty  
 3 police officer ("Smith") spotted a vehicle being driven recklessly. When Smith attempted to  
 4 pull over the suspect, the suspect fled and then got into an accident. Smith got out of his car and  
 5 approached the suspect to see if he needed medical aid. When Smith approached, the suspect  
 6 started hitting, grabbing, and choking Smith. The fight escalated to where the suspect tried to  
 7 grab Smith's gun so Smith shot and killed the suspect. Id. at 1179-1181. Even though there was  
 8 a question of fact as to whether or not the suspect and Smith were grappling over the officer's gun  
 9 at the moment of the shooting, that dispute was not material as it was reasonable for Smith to fire  
 10 at the suspect under all circumstances existing at that point in time, including the fact that Smith  
 11 was locked in "hand-to-hand combat and losing." Id. at 1183, 1185. (emphasis added). The  
 12 Court stated that under the circumstances, a reasonable officer would perceive a substantial risk  
 13 that the suspect would seriously injure or kill him, either by beating and kicking him or by taking  
 14 his gun and shooting him with it. Id. at 1185. Ultimately, the deadly force used by Smith was  
 15 found to be justified. Id.

16           Similarly, other cases have found that when a suspect is violently resisting arrest and/or  
 17 making threatening gestures, deadly force is justified. Forrett v. Richardson, 112 F.3d 416, 420-  
 18 421 (9<sup>th</sup> Cir. 1997) (finding no 4th Amendment violation when officers shot an unarmed fleeing  
 19 suspect in the back after a violent residential burglary as he still posed a serious threat of harm to  
 20 the officers or others);. Ultimately, it is not unreasonable for a police officer to use deadly  
 21 force in self-defense. Romero v. Bd. Of County Comm'r's of the County of Lake, Colorado, 60  
 22 F.3d 702 (10<sup>th</sup> Cir. 1995). (emphasis added).

23           Other courts are in line with these authorities. For example, in Tom v. Volda, 963 F.2d  
 24 952 (7<sup>th</sup> Cir. 1992), a police officer benevolently approached an 18 year old whom she did not  
 25 suspect of any wrongdoing. This innocent encounter progressively escalated into a foot pursuit, a  
 26 violent struggle and ultimately a fatal shooting of the citizen. Id. at 954. After analyzing the  
 27 event step by step, the Court concluded that the victim's actions, not the officer's reactions,  
 28 precipitated every step of the escalation to violence. Id. At the time when the officer shot the

1 victim, the victim had already beat the officer and was moving aggressively towards the officer.  
 2 Id. at 961. Also, the victim was actively and violently resisting the officer, not fleeing. Id. at  
 3 962. The Plaintiff had no witnesses who could testify that the victim was surrendering, had no  
 4 scientific evidence that the victim was retreating from the officer and obviously no testimony  
 5 from the decedent victim. Id. at 961. Ultimately, the officer was justified in concluding that the  
 6 victim could not be subdued except through gunfire as the victim had already inflicted serious  
 7 bodily injury on her and threatened to continue doing so. Id. at 962. (See also Parks v. Pomeroy,  
 8 387 F.3d 949, 956-958 (8<sup>th</sup> Cir. 2004) (Qualified immunity given to officer who shot into the  
 9 back of the shoulder of the aggressor of a fight with another officer as it was not clearly  
 10 established that shooting an unarmed person who is violently struggling with another officer was  
 11 unlawful); Crabtree v. Hair, 2007 U.S. Dist. LEXIS 82502, \*26-26 (N.D. Okl.. 2007) (Finding no  
 12 4<sup>th</sup> Amendment violation when the officer, who had been locked in a violent struggle and had  
 13 suffered vision loss at the hands of decedent, shot decedent when decedent had moved perhaps 20  
 14 plus feet away from the officer as the officer was still in fear for his life).

15 Here, looking at the totality of the circumstances facing Deputy Patzer, it is clear that  
 16 Deputy Patzer's use of deadly force comported with the 4<sup>th</sup> Amendment. First of all, Deputy  
 17 Patzer believed he was chasing a felony suspect who was involved in a stolen vehicle crime.  
 18 Indeed, all the objective evidence of the Mustang's condition made it very likely that it had been  
 19 stolen. (See Exh. F). Car theft is a dangerous felony crime and is often associated with violence.  
 20 Bull v. City & County of San Francisco, 2006 U.S. Dist. LEXIS 9120, \* 46 (N.D. Cal. 2006). In  
 21 addition, Decedent's reckless driving prior to stopping his vehicle may have risen to a felony  
 22 offense. Further, once Decedent attacked and struck Deputy Patzer, he committed a felony  
 23 battery of a peace officer at a minimum. Overall, it cannot be disputed that the first Graham  
 24 factor, the severity of the crime at issue, was met under these circumstances.

25 The second and third Graham factors, whether the suspect poses an immediate threat to  
 26 the safety of the officer or others and whether the suspect is actively resisting arrest or attempting  
 27 to evade arrest by flight, are also satisfied here. Initially, there is no dispute that Decedent fled  
 28 from police on foot after being initially detained. After Deputy Patzer caught up to Decedent,

1 Decedent initiated aggressive contact by punching Deputy Patzer in the head, dazing Deputy  
 2 Patzer. Decedent then continued to punch and take swings at Deputy Patzer, some of which made  
 3 contact and others were deflected by Deputy Patzer's attempted defensive maneuvers. Deputy  
 4 Patzer did not know whether or not Decedent had a weapon on him when he fled or whether or  
 5 not he was able to obtain one during his flight. In the total darkness of the side yard, Deputy  
 6 Patzer could not see the hands or waistband of Decedent during the altercation, but only the  
 7 aggressive silhouette of Decedent. After Deputy Patzer tried to push Decedent away several  
 8 times, instead of fleeing, Decedent continued to aggress at Deputy Patzer, pushing Deputy Patzer  
 9 down and hovering over the Deputy. Deputy Patzer's safety was under immediate attack by  
 10 Decedent. Also, it was during this time that Decedent pushed Deputy Patzer into what we now  
 11 know was the air conditioner unit, which Deputy Patzer reasonably believed at the time was  
 12 perhaps another aggressor.

13 Decedent continued to actively resist at all times by attacking Patzer when he could have  
 14 fled and Decedent's resistance did not stop until Deputy Patzer fired his weapon. Deputy Patzer  
 15 continued to order Decedent to stop resisting, but Decedent continued to attack the Deputy.  
 16 Deputy Patzer's injuries, including the knot to his head and the scrapes to his body, plus the  
 17 damages to his uniform demonstrate objective evidence of the severity of the struggle and attack  
 18 by Decedent. It was only after Decedent was hovering over and prevailing over Deputy Patzer  
 19 for the third time that Deputy Patzer shot one time to try to protect himself from serious bodily  
 20 injury or worse and stop Decedent's violence.

21 **At no point in time did Decedent ever stop resisting.** Decedent showed significant  
 22 strength due to his high level of methamphetamine intoxication and had this altercation continued  
 23 further, there was a strong likelihood that Decedent would have overpowered Deputy Patzer to  
 24 the point of seriously injuring or killing him. Deputy Patzer did not have the opportunity to try to  
 25 use other force options in the narrow and dark side yard area due to Decedent's immediate and  
 26 overwhelming aggression, the rapidity of the events and the confines of the area. Deputy Patzer  
 27 was in fear of his life and fired his weapon (in a retained position) to attempt ward off the assault  
 28 and battery from Decedent. Most, if not all, officers in Deputy Patzer's shoes would have taken

1 the same action in firing at the violent Decedent to repel the aggression, demonstrating that  
 2 Deputy Patzer acted in an objectively reasonable manner. Like the officers in Billington and  
 3 Tom, and similar authorities, Deputy Patzer was locked in hand-to-hand combat and losing and  
 4 needed to resort to deadly force to prevent himself from being seriously injured or killed by  
 5 Decedent. Deputy Patzer's actions comported with the 4<sup>th</sup> Amendment.

6                   2. Even if the Court Finds a Triable Issue Relating to Whether or Not  
 7 There Was A Constitutional Violation Under the 4th Amendment,  
the Defendant Officer Is Still Entitled to Qualified Immunity

8                   Should the Court find a triable issue of fact that Deputy Patzer violated Decedent's  
 9 constitutional rights per the 4<sup>th</sup> Amendment, Deputy Patzer is still entitled to judgment as a matter  
 10 of law per qualified immunity as it was not clearly established that shooting a violently aggressive  
 11 resistive person, who is winning in a hand-to-hand struggle with the officer, was unlawful. Even  
 12 if the Court finds Deputy Patzer's actions objectively unreasonable, which we believe cannot be  
 13 found here, the next inquiry is whether, at the time of the officers' actions, it was clearly  
 14 established that the officer's conduct violated the constitutional rights of the injured person.  
 15 Brosseau, at 199-200, citing Saucier, at 202. If Plaintiff meets their burden of proving the  
 16 existence of a clearly established right at the time of the alleged impermissible conduct, the next  
 17 inquiry is whether a reasonable official could have believed that the conduct was lawful. David,  
 18 at 48.

19                   Here, Plaintiff can point to no case where a court has established that an officer cannot use  
 20 deadly force when being constantly attacked and threatened by a suspect in a dark and confined  
 21 space. On the contrary, several cases, as stated above, have indicated that deadly force under  
 22 similar circumstances is lawful. (See Brosseau v. Haugen, 543 U.S. 194, 200-201 (2004) (finding  
 23 that it was not clearly established in 1999 that shooting a fleeing suspect in the back as he fled in  
 24 his vehicle, potentially endangering nearby officers and others, was a 4th Amendment violation,  
 25 and noting that "this area is one in which the result depends very much on the facts of each  
 26 case."); Blanford v. Sacramento County, 406 F.3d 1110, 1119 (9<sup>th</sup> Cir. 2005) (finding qualified  
 27 immunity as it was not clearly established in November of 2000 that officers could not use deadly  
 28 force to prevent someone with an edged sword, who had failed to respond to police commands

1 and warnings, from accessing a private residence where they or people in the house or yard might  
 2 be serious injured); Boyd v. City of San Francisco, U.S. Dist. LEXIS 33831 \*2-6 (N.D. Cal.  
 3 2007) (Judge Chesney found that even though there was a factual issue as to whether or not the  
 4 use of deadly force was necessary to prevent Boyd from escaping at the moment Officer  
 5 O'Malley fired his gun at him, Officer O'Malley was entitled to qualified immunity with respect  
 6 to the 4<sup>th</sup> Amendment because the law was not sufficiently settled, at the time of the incident, that  
 7 Officer O'Malley was not entitled to use deadly force in the circumstances he confronted);

8 These significant binding (Billington, Brosseau, Blanford, Forrett, Boyd) and persuasive  
 9 (Tom, Parks, Crabtree) authorities show that it is not clearly established that shooting at a  
 10 repeatedly attacking felony suspect, who is winning the fight with the officer, who may be armed,  
 11 and may not be the lone aggressor, is a violation of the 4<sup>th</sup> Amendment. On the other hand, these  
 12 authorities stand for the proposition that it was reasonable and proper for Deputy Patzer to defend  
 13 himself using deadly force under these circumstances. No case has precluded Deputy Patzer from  
 14 using deadly force in his situation. As such, Deputy Patzer is entitled to qualified immunity.

15 Furthermore, even assuming Plaintiff can show that the law was clearly established that  
 16 Deputy Patzer's actions violated the constitution (which Plaintiff cannot), a reasonable officer in  
 17 the circumstances facing Deputy Patzer here could have believed that his use of deadly force to  
 18 stop the violently threatening Decedent was lawful. Due to Decedent's escalation of violence and  
 19 continued aggression, Deputy Patzer was forced to resort to deadly force to defend himself  
 20 against the potentially deadly threat profile posed by Decedent. Deputy Patzer reasonably  
 21 believed that Decedent posed a threat of serious bodily injury or death to himself, which was  
 22 evident when Decedent landed punches on Deputy Patzer, was on top of him several times and  
 23 failed to flee or retreat when given several opportunities to do so. It was as if Decedent would do  
 24 almost anything to avoid capture, including trying to kill or mame Deputy Patzer at all costs.

25 Even if Deputy Patzer was mistaken about his ability to use deadly force to fend off  
 26 Decedent, his mistake was reasonable under the tense, uncertain and swift circumstances he was  
 27 presented. Blanford v. Sacramento County, 406 F.3d 1110, 1119 (9<sup>th</sup> Cir. 2005). At a minimum,  
 28 Deputy Patzer's conduct fell within the "hazy border between excessive and acceptable force,"

1 entitling him to qualified immunity. Saucier v. Katz, *supra*, at 206.

2                   **D. Defendant Deputy Patzer's Use of Deadly Force Did Not Violate the**  

3                   **Plaintiff's 14th Amendment Rights for Maintaining a Parental**  

4                   **Relationship**

5 Plaintiff also alleges a § 1983 claim for violation of the parental relationship, an interest  
p-6 protected by the 14<sup>th</sup> Amendment, against Defendant Patzer. “It is well established that a parent  
p-7 has a fundamental liberty interest in the companionship and society of his or her child and that the  
p-8 state’s interference with that liberty interest without due process of law is remediable under 42  
p-9 U.S.C. § 1983.” Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004); Lee v. City of Los  
p-10 Angeles, 250 F.3d 668, 685 (9th Cir. 2001). The constitutional interest in familial companionship  
p-11 and society protects against deprivations that are a result of “unwarranted state interference.” See  
p-12 Lee, 250 F.3d at 685; Crowe v. County of San Diego, 359 F.Supp.2d 994, 1039 (S.D. Cal. 2005).  
p-13 Where a claim for interference with familial relationships is integrally predicated upon, or  
p-14 entwined with, other conduct that is alleged to be unconstitutional, a finding that the other  
p-15 conduct was constitutional will preclude recovery for interference with familial relationship. See  
p-16 Gausvik v. Perez, 392 F.3d 1006, 1008 (9th Cir. 2004); Schaefer v. Goch, 153 F.3d 793, 799 (7th  
p-17 Cir. 1998) (“Because we have concluded that Sergeant Goch did not violate Kathy Nislowski’s  
p-18 rights under the Constitution, her parents’ claims based on the loss of her society and  
p-19 companionship necessarily fail as well.”); Crowe, 359 F.Supp.2d at 1039.

20                  Here, Plaintiff’s claim based upon the loss of his society and companionship of Decedent  
p-21 is predicated and entwined with Plaintiff’s claim for a violation of Decedent’s 4<sup>th</sup> Amendment  
p-22 rights against excessive force. But for the shooting incident, Plaintiff would not be able to raise  
p-23 such a claim. In that vein, as stated above, Deputy Patzer’s actions did not violate the 4<sup>th</sup>  
p-24 Amendment and if any such violation can be found, Deputy Patzer is entitled to qualified  
p-25 immunity, barring Plaintiff’s 14<sup>th</sup> Amendment claim for interference with Plaintiff’s familial  
p-26 relationship. As such, this claim fails as a matter of law in light of the 4<sup>th</sup> Amendment analysis  
p-27 above.

28                   **E. Plaintiff Cannot Demonstrate Any *Monell* Related Claims**

29 Plaintiff has also alleged a Monell related claim in this case per his third claim for relief.

1 To prevail on a § 1983 claim against a municipality, a plaintiff must show (1) that he suffered a  
 2 deprivation of a constitutionally protected interest; and (2) that the deprivation was caused by an  
 3 official policy, custom or usage of the municipality. Monell v. New York Department of Social  
 4 Services, 436 U.S. 658, 690-691 (1978). Municipal liability based on alleged unconstitutional  
 5 acts of employees cannot be established on the basis of respondeat superior, but rather requires  
 6 proof that the harm was caused by the policy or custom of the municipality. Id. at 694. While  
 7 liability of municipalities does not depend upon the liability of individual officers, it is contingent  
 8 on a violation of constitutional rights meaning without an underlying constitutional violation,  
 9 there can be no municipal liability. Scott v. Henrich, 39 F.3d 912, 916 (9<sup>th</sup> Cir. 1994).

10 As Deputy Patzer did not violate any constitutional rights of the Decedent, neither Sheriff  
 11 Rupf nor the County of Contra Costa can be liable under 42 U.S.C. § 1983. Forrett v.  
 12 Richardson, 112 F.3d 416, 421 (9<sup>th</sup> Cir. 1997) (no Monell liability when the individual officers  
 13 inflicted no constitutional harms); Quintanilla v. City of Downey, 84 F.3d 353, 355 (9<sup>th</sup> Cir. 1996)  
 14 (same). Therefore, no Monell related claims can survive this motion.

15 Even if the Plaintiff can demonstrate a constitutional violation and defeat Deputy Patzer's  
 16 qualified immunity arguments in this regard, Plaintiff cannot set forth any evidence showing a  
 17 policy, custom or practice of the Sheriff or County to prove their Monell claim. There is no  
 18 evidence that the Sheriff or County had a policy of using excessive and/or deadly force. There is  
 19 no evidence that the County has been involved in a significant number of deadly force shootings  
 20 prior to this incident. Nor is there any evidence that the County failed to properly train Deputy  
 21 Patzer which amounts to deliberate indifference to the rights of the persons with whom the police  
 22 come into contact. City of Canton v. Harris, 489 U.S. 378, 390-391 (1989). In fact, Deputy  
 23 Patzer was extensively well trained, especially with regard to use of force and deadly force issues.  
 24 As such, there is no evidence to which a trier of fact could conclude that municipal liability is  
 25 present versus either the Sheriff or the County so this Monell claim fails as a matter of law.

26  
 27  
 28

1                   **F. Plaintiff's Additional State Law Claims Also Fail as a Matter of Law**2                   1. Plaintiff's State Law Claims Fail As Defendant Patzer Acted in  
3                   Accordance with the Fourth Amendment

4                   In addition to the constitutional claims, Plaintiffs other state law claims also fail as stated  
5                   above. In this case, Plaintiff alleges wrongful death (negligence) and state civil rights claims per  
6                   the 4<sup>th</sup> and 5<sup>th</sup> claims for relief. As stated above in Footnote 3, all state law negligence and intent  
7                   based claims are judged per the "objective reasonableness" standard. Martinez v. County of Los  
8                   Angeles (1996) 47 Cal.App.4<sup>th</sup> 334, 343-344; Edson v. City of Anaheim (1998) 63 Cal.App.4<sup>th</sup>  
9                   1269, 1273-74. As analyzed in detail above, Deputy Patzer's actions under this tense and  
10                   threatening situation clearly and objectively warranted the use of deadly force to stop the constant  
11                   escalating aggression of Decedent. No reasonable trier of fact can conclude that Deputy Patzer  
12                   was not entitled to use deadly force to protect himself from Decedent's violence and apparent  
13                   attempt to seriously injure and/or kill Deputy Patzer. As Deputy Patzer's conduct under these  
14                   circumstances, as viewed from the perspective of a reasonable officer in Deputy Patzer's shoes,  
15                   was objectively reasonable, all Plaintiff's state law negligence and intent based claims, namely  
16                   the 4<sup>th</sup> and 5<sup>th</sup> claims for relief, also fail as a matter of law.

17                   2. Even if the Court Finds a Triable Issue With Regard to Any State  
18                   Law Claims, Defendant Patzer Is Still Entitled to Immunity

19                   Should the Court find any triable issues of material facts with regard to the state law  
20                   claims, Deputy Patzer should still prevail on these state law claims per the immunities offered to  
21                   peace officers performing discretionary acts within the course of their employment. Under  
22                   California Government Code ("GC") § 820.2, the "discretionary immunity" rule, public  
23                   employees are immunized from liability in performing discretionary acts within the scope of their  
24                   employment. A discretionary act, as opposed to a ministerial task, requires "personal  
25                   deliberation, decision and judgment". McCorkle v. Los Angeles, (1969) 70 Cal. 2d 252, 261. A  
26                   police officers' decision to use deadly force is a discretionary act. People v. Rivera, (1992) 8  
27                   Cal.App.4<sup>th</sup> 1000, 1007. Further, if a shooting officer is given immunity, the County is also  
28                   entitled to immunity. According to GC § 815.2, "a public entity is not liable for an injury

1 resulting from an act or omission of an employee of the public entity where the employee is  
 2 immune from liability.” In other words, the County’s immunity depends upon whether the officer  
 3 is immune. Robinson v. Solano County, (9<sup>th</sup> Cir. 2002) 278 F.3d 1007, 1016.

4 In this case, Deputy Patzer’s use of deadly force in the face of the significantly threatening  
 5 and aggressive profile posed by Decedent entitles him to immunity for exercising the discretion to  
 6 use deadly force. As Deputy Patzer is immune for this exercise of discretion, the County is  
 7 likewise immune for these state law claims. These state law claims are subject to summary  
 8 judgment.

9 **V. CONCLUSION**

10 For the above stated reasons, Defendants are entitled to judgment as a matter of law.

11  
 12 Dated: August 5, 2008

13  
 14 MCNAMARA, DODGE, NEY, BEATTY, SLATTERY,  
 15 PFALZER, BORGES & BROTHERS LLP

16 By: 

17 James V. Fitzgerald, III / Noah G. Blechman

18 Attorneys for Defendants

19 COUNTY OF CONTRA COSTA, JOSHUA PATZER,  
 20 and WARREN RUPF

## 1 PROOF OF SERVICE BY MAIL (C.C.P. §§ 1013a, 2015.5)

2 I hereby declare that I am a citizen of the United States, am over the age of eighteen years,  
3 and not a party to the within action; my business address is 1211 Newell Avenue, Walnut Creek,  
4 California 94596.

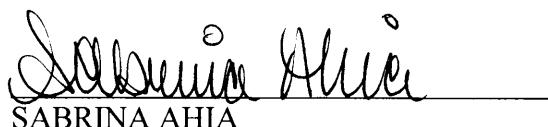
5 On this date I served the foregoing **DEFENDANTS' MEMORANDUM OF POINTS**  
6 **AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT/**  
7 **SUMMARY ADJUDICATION** on the parties in said action, by placing a true copy thereof  
8 enclosed in a sealed envelope addressed as listed below for mailing. I am readily familiar with  
9 this firm's practice of collection and processing correspondence for mailing. Under that practice,  
10 it would be deposited with the United States Postal Service on that same day with postage thereon  
11 fully prepaid, in the United States Post Office mail box at Walnut Creek, California, addressed as  
12 follows:

13 **Attorneys For Plaintiff:**

14 Larry E. Cook, Esq.  
15 Casper, Meadows, Schwartz & Cook  
16 2121 N. California Blvd., Suite 1020  
Walnut Creek, CA 94596

17 Phone: 925-947-1147  
Fax: 925-947-1131

18 I declare under penalty of perjury under the laws of the State of California that the  
19 foregoing is true and correct and that this declaration was executed on August 5, 2008 at Walnut  
20 Creek, California.

21   
22 SABRINA AHIA  
23  
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25  
26  
27  
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